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Discretionary immunity just became a little tougher

by W. Anthony Andrews

Illinois has long held that public bodies are immune from liability for conduct that was of a discretionary matter. So, where a municipality deliberately evaluates whether to spend some of the resources to repair a public structure, like a sidewalk slab, it cannot be liable for a subsequent injury arising from it. However, the Illinois Supreme Court recently decided a case involving the Local Governmental and Government Employees Tort Immunity Act (Act) (745 ILCS 10/2-109, 2-201) that provided that discretionary immunity, but also restricted it.

In *Monson v. City of Danville,* 2018 IL 122486, Barbara Monson sued the City of Danville after she tripped and fell on a disjointed sidewalk and sustained serious injury. Prior to her fall, City officials had begun a project designed to repair sections of concrete throughout the City. The City made decisions to repair sidewalks based on height between varying sidewalks, how frequently the pathway was traveled, proximity of the potential sidewalk defect to buildings, intended use of the area, etc.

The City began this project to repair defective pavement and streets in the fall of 2011. Two City employees conducted walkthroughs of all the affected areas and marked portions of the sidewalk that needed repair. These two employees then made the decision *not* to mark the specific area of sidewalk that eventually caused Monson's injury.

When sued, the City argued that it was entitled to immunity pursuant to Sections 2-109 and 2-201 of the Act. The City claimed that the decision not to repair the portion of the sidewalk that caused Monson's injury was discretionary, and thus immunized them from liability, because the decision to repair or not repair certain segmentations of sidewalk is a matter of public policy.

To evaluate the issue, the court compared the facts to *Richter v. College of DuPage,* 2013 IL App (2d) 130095, where a student filed a lawsuit against College of DuPage after tripping and falling on a sidewalk. In the *Richter* case, the manager of the building had complete control of the building and the grounds. Further, this manager was notified of the defect prior to the plaintiff's accident because someone else tripped and injured themselves in the same location.

The *Richter* case also contained record of all decision-making processes including the decision to put up cones, paint the sidewalk yellow, etc. Therefore, the court in *Richter* held that the building manager's handling of the sidewalk defect was an exercise of discretion and constituted a policy determination under Section 2-201 of the Act.

The facts of *Richter* differed from *Monson* because the manager in *Richter* had total control over the property, executed a clear decision-making process, and was notified of the defect. On the other hand, in *Monson*, the record provided no evidence of the City's thought-process in deciding to not repair the sidewalk. In fact, the two City workers

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Title IX threshold is no easy feat

by Craig D. Hasenbalg

Conduct that raises red flags as to the boundaries between school personnel and students does not mean that school administration has actual notice or knowledge of the risk of certain sexual misconduct. In the case of *Jane Doe Number 55 v. Madison Metropolitan School District*, 897 F.3d 819 (7th Cir. 2018), a student sued a school district for discrimination based on gender due to sexual misconduct of an employee. In *Jane Doe*, summary judgment was granted in favor of the school district by the district court. The court concluded that school's principal did not have actual notice of the sexual abuse, as is required in a Title IX claim.

Title IX states that any educational institution receiving federal funds cannot discriminate in providing educational benefits based on gender. 20 U.S.C. § 1681(a). A private suit must show a school official who has authority to address discrimination has actual knowledge of the discrimination and fails to adequately respond, amounting to deliberate indifference.

The required notice can take two forms. The first is actual notice, meaning the school official knew of the conduct. The second is a risk so obvious that it is as if the school official knew of the conduct. The court's example of this second risk would be knowledge of a "serial harasser." This example indicates a scenario in which the

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Title IX threshold

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actual knowledge requirement may be met even if the school official lacked knowledge of the specific conduct alleged.

Jane Doe was a student at Whitehorse Middle School within the Madison Metropolitan School District where a security assistant was employed to supervise and monitor school safety. The school's positive behavior support coach, counselor, and a teacher all notified the principal of their concern with the conduct of the security assistant toward students.

The security assistant was seen rubbing Doe's shoulders, and Doe had jumped and hung on the assistant and had kissed his cheek during her seventh-grade year. These observations were reported to the principal. The principal met with the security assistant to discuss the issues.

The security assistant countered by informing the principal that Doe confided in him about family and peer relationships. The principal emphasized the need for clear boundaries between the assistant and Doe.

From the end of Doe's seventh-grade and throughout her eighth-grade year, the principal noticed a significant decrease in the interaction between the security assistant and Doe. However, at the beginning of her first year of high school, Doe made an allegation of sexual abuse that occurred during eighth grade by the security assistant. The Madison Police Department was notified of the allegations and commenced an investigation. School district officials were made aware of the allegations and immediately put the security assistant on a leave of absence.

The principal was unaware of Doe's abuse allegations until *after* Doe graduated from middle school. No teacher or staff member reported any incidents or concerns about the security assistant to the principal during Doe's eighth-grade year, nor had the principal seen physical contact between the assistant and Doe. Due to the lack of reports or sightings during the eighth-grade year, Doe relied on the events of the previous school year to establish the principal's actual knowledge. This included the reports from personnel about concern over the security assistant's conduct with students and the sighting by the principal of conduct between Doe and the assistant.

The Seventh Circuit did not find actual knowledge of any sexual misconduct. Knowledge was lacking "of a risk so great that harm was almost certain to occur if nothing was done." Although there may have been concern over stronger boundaries necessary between Doe and the security assistant, a reasonable jury could not have found the principal had actual knowledge of sexual misconduct by the assistant that created a serious risk to Doe.

The Seventh Circuit affirmed the granting of summary judgment by the district court in favor of the school district. The Seventh Circuit's analysis here is consistent with its findings in previous cases that mere suspicion is not actual knowledge.

Other courts of appeals have upheld similar demanding standards concerning what constitutes actual notice. For example, in *Wills v. Brown Univ.*, 184 F.3d 20 (1st Cir. 1999), misconduct had occurred before the sexual harassment of the particular student, but only teachers were notified with the provost and dean lacking knowledge until after the sexual harassment. However, in *Doe v. Sch. Bd. of Broward Cty.*, 604 F.3d 1248 (11th Cir. 2010), two complaints of sexual misconduct filed prior to the conduct in question, of which the principal had actual notice, fulfilled the actual notice requirement. These cases reflect consistent treatment of the actual notice or knowledge requirement with the *Jane Doe*.

The case of *Jane Doe Number 55 v. Madison Metropolitan School District* indicates that plaintiffs bringing a Title IX claim regarding sexual misconduct of an employee must strictly fulfill the notice requirement of a school official in order to successfully implicate the school district. Although there *may* be circumstances where actual knowledge of the misconduct is not required, it is a high threshold to show that the risk of harm is great enough that harm will almost certainly be forthcoming. Mere suspicion, without evidence -- is not enough to induce a school's liability. ■

Attorney fees awarded against EEOC...almost

by Joshua B. Rosenzweig

In the civil court systems of the United States -- whether it be a state court or the federal court system -- the "American Rule" is typically followed with respect to attorney's fees. The American Rule provides that each party is responsible for paying its own attorney's fees. However, there are a few exceptions to this general rule:

- Where there is a specific statute that grants specific authority to award attorney's fees;
- Where a contract specifically allows the assessment of attorneys against the other party; or
- If a court finds that a party proceeded in a frivolous manner.

The frivolity of the position of the Equal Employment Opportunity Commission ("EEOC") became the main issue involved when it brought suit against CVS Pharmacy, Inc. in 2014, which prompted a review of whether the EEOC owed CVS attorneys fess for bringing the action.

In *EEOC v. CVS Pharmacy, Inc.* 809 F.3d 335 (7th Cir. 2015), the EEOC filed a complaint against CVS, alleging CVS used a severance agreement to impede its employees' exercise of their rights under Title VII. The severance agreement at issue included broad release language and a covenant not to compete, but also attempted to carve out certain, obscure exceptions that the EEOC claimed would deter individuals from cooperating with the EEOC.

Tonia Ramos, who had signed and accepted the CVS' severance agreement, filed a charge against CVS in 2011. The EEOC dismissed the charge and provided Ramos with a "right to sue letter," but did not pursue a claim on her behalf. Instead, the EEOC filed a complaint under Section 707(a) of Title VII claiming that CVS had engaged in a pattern or practice of resistance to the rights afforded by Title VII. (42 U.S.C. § 2000 e-6).

Title VII provisions, namely Sections 706 and 707(e), require that the complaining party engage in a procedure known as "conciliation" prior to the filing of a lawsuit so as to see if an acceptable solution can be reached prior to the filing of a lawsuit. According to the EEOC, Section 707 (a) does not require such a procedure to take place prior to the filing of a lawsuit, and therefore, the EEOC filed its complaint without attempting to find a pre-suit resolution.

At the trial level, the judge awarded summary judgment to CVS, because the court found that the EEOC failed to conciliate though it should have. The court awarded CVS $307,902.30 in attorney's fees, claiming that the EEOC should have realized before filing suit that EEOC regulations required initial conciliation before proceeding with an enforcement action.

The Seventh Circuit was asked to review whether the award of attorney's fees was warranted. The Seventh Circuit reviews an award of attorney's fees for an "abuse of discretion" by the district court. The Seventh Circuit took a "fresh look at the reasonableness of the EEOC's legal theory, but [would] defer to the district court's

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Recent Verdicts of Interest

- **Striking Car in Funeral Procession costs $66,000**

Truck with green light struck a car in a funeral procession facing red light leading to injury to passenger including concussion, fractured orbit and losing 2 teeth. Jury awarded passenger $66,000 despite trucker's claim of large gap between plaintiff's car and vehicles in procession ahead.

- **Shot Twice While Fleeing Police Nets $0**

After traffic stop in Zion, driver produced temporary driving permit and expired insurance card. As officer opened door and asked driver to step out, driver shifted gears and slammed on the accelerator. Officer jumped on the door sill, grabbed steering wheel and fired two shots into driver's abdomen. Jury found force used was not excessive due to danger posed to pedestrians and passenger (though jury did not even hear that back-up officer had been knocked down by fleeing vehicle).

- **Police Run Over Intoxicated Woman in Alley**

Police responding to suspected narcotics activity in alley ran over an intoxicated woman passed out in the alley. Woman suffered pelvic fracture and burns with $265,360 in medical expenses. Jury found for plaintiff but reduced her award by 50% for her contributory negligence from $530,000 to $265,000 (almost exactly her medical bills).

Above are sample verdicts taken from the Cook County Verdict Reporter. Valuation of injuries and exposure to a defendant vary greatly based on the specific factors of a case. To assess the value or cost of a specific injury, contact one of our litigators.

Attorney fees awarded

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assessment of the case's procedural history and factual foundations."

Title VII allows for the shifting of attorney's fees to the prevailing party, but those awards are generally only made in "exceptional" cases. The Seventh Circuit found that a district court may award fees to a prevailing defendant only upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith. The Seventh Circuit noted that appellate courts are cautioned not to exhibit "*post hoc reasoning*" when determining the reasonableness of a claim.

In reversing the district court's decision to award attorney's fees to CVS, the 7th Circuit engaged in a step-by-step review of the EEOC's case. Ultimately, the Seventh Circuit concluded there was no frivolity to the EEOC's position. Rather, the Seventh Circuit indicated a more nuanced review of Sections 706 and 707, and its subsections, of Title VII was required in this particular instance.

Specifically, the Seventh Circuit noted that both Section 707(a) and 707(e) concern "pattern or practice claims." Section 707(e) requires that conciliation procedures be followed when determining if an employer has engaged in a pattern or practice of discrimination. However, Section 707(a), which concerns claims involving a pattern or practice of resistance to the full enjoyment of any rights secured by Title VII, does not have the same procedural requirement.

CVS claimed that the EEOC's actions were improper since the charge upon which the lawsuit was originally filed, the charge by Ramos under Section 707(e), required the EEOC to follow the conciliation procedures identified in Section 706. However, the Seventh Circuit held that the Ramos' charge was dismissed, and therefore, the Ramos claim was not the basis for the complaint filed by the EEOC.

The Seventh Circuit noted that a reading of the whole complaint revealed it was a 707(a) claim, and therefore, carried no requirement to follow the conciliation steps first. Therefore, though CVS won the underlying case, the compliant was not frivolous and thus did not merit an award of attorney's fees.

In general, courts in this country follow the American Rule where each party pays its own attorney's fees. However, in limited circumstances, fees may be shifted from the prevailing party to the other party *if* a statute or contract allows for such shifting. Additionally, an award of fees may be shifted if the reviewing court finds that one party has acted frivolously in advancing a particular claim.

However, as evidenced by the CVS case, the reviewing court will likely review any order for attorney fees against the EEOC with great scrutiny, affirming the fact that attorney's fees in favor of a successful defendant are exceedingly rare. ■

Discretionary immunity

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involved in the inspections could not remember if they evaluated the specific site where Monson fell. Therefore, the court held that the city had not met its burden of proof entitling it to discretionary immunity under Sections 2-109 and 2-201.

Essentially, the Illinois Supreme Court held that a public entity claiming immunity for a defect must present evidence that the public entity itself made the conscious decision to forego repairing the defect. Here, two City employees made the decision to leave the sidewalk defects as-is. The decision to forego repairs was the employees' decision and not the City's decision. Further, the City did not present any evidence detailing the rationale as to why the City did not repair certain sidewalks. Therefore, the court declined to find that that discretionary immunity applied.

While public bodies are still immune for failing to repair a public structure if it made a conscious decision not to do so, where that public body seeks to apply this immunity, it must produce compelling evidence that it specifically evaluated the defect. ■

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